

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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UNITED STATES OF AMERICA

Plaintiffs,

v.

RUETGERS ORGANICS CORPORATION

Defendant

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C.A. No. 4: CV-96-2128

Filed: December 6, 1996

Judge Malcolm Muir

**AGREEMENT AND ORDER REGARDING MODIFICATION OF  
THE CONSENT DECREE TO INCLUDE REIMBURSEMENT FOR PAST AND  
FUTURE OVERSIGHT COSTS**

Pursuant to the terms of the Consent Decree entered by the Court on April 16, 1997 (the "1997 Consent Decree"), the Parties have agreed to modify certain provisions of the 1997 Consent Decree. As required by the terms of the 1997 Consent Decree, the parties request the entry of the Court for the proposed modifications. This "Agreement and Order Regarding Modification of the Consent Decree to Include Reimbursement for Past and Future Oversight Costs" ("Modification Agreement") is intended only to replace the sections of the 1997 Consent Decree referred to herein. It is the parties' intention and understanding that all other provisions of the 1997 Consent Decree remain in force.

## **I. BACKGROUND**

A. On December 6, 1996, the United States of America ("United States") on behalf of the Environmental Protection Agency ("EPA") filed a complaint against Rutgers Organics Corporation ("Settling Defendant") (fka Ruetgers-Nease Corporation) pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9607, seeking reimbursement of response costs incurred and to be incurred for response actions taken at or in connection with the release or threatened release of hazardous substances at the Centre County Kepone Superfund Site ("Site"), located in Centre County, Pennsylvania.. The Commonwealth of Pennsylvania ("State"), on behalf of the Pennsylvania Department of Environmental Protection ("DEP") also filed a complaint against Settling Defendant pursuant to Section 107 of CERCLA for reimbursement of response costs for the Site.

B. Simultaneous with the filing of the United States' Complaint, docket number 4: CV-96-2128, the United States and the State (collectively "Plaintiffs") lodged the 1997 Consent Decree with Settling Defendant, which was entered by the Court on April 16, 1997.

C. Settling Defendant has been performing the remedial design and remedial action work outlined in the 1995 Record of Decision "ROD" and pursuant to its obligations under the 1997 Consent Decree. In addition to performing the work, Settling Defendant has also reimbursed EPA for past response costs and agreed to pay EPA's future response costs. EPA has collected \$710,289.80 through August 6, 2007.

D. The 1997 Consent Decree obligated Settling Defendant to pay the United States's past response costs and future response costs, as narrowly defined to exclude reimbursement of past

and future remedial design and remedial action oversight costs, because at the time of the 1997 Consent Decree recovery of the United States' remedial design oversight costs was unavailable. *U.S. v. Rohm and Haas Co.*, 2 F.3d 1265, 1279 (3rd Cir. 1993). (Holding that removal oversight costs (of which remedial design oversight costs are a subset) were not recoverable, including costs incurred by government in monitoring performance of private party's remediation of hazardous wastes, such as cost of contractors hired by government to review plans and work of private party or its agents executing response action.) In addition, several federal district courts had ruled that the Third Circuit's reasoning in *Rohm & Haas* precluded the recovery of remedial action oversight costs as well as removal oversight costs. *See, e.g., U.S. v. Serafini*, 898 F.Supp. 287 (M.D.Pa. 1994), *aff'd*, 135 F.3d 767 (1997). *See also, U.S. v. Atlas Mineral*, 851 F.Supp. 639 (E.D.Pa. 1994).

E. On December 22, 2005, the United States Court of Appeals for the Third Circuit issued an opinion in *United States of America v. E.I. DuPont de Nemours et al.*, 432 F.3d 161 (3d Cir. 2005). The United States contends that the Dupont opinion authorizes the United States to recover costs incurred by EPA in overseeing private party removal and remedial actions.

F. In light of the *Dupont* holding, the United States entered into negotiations with Settling Defendant regarding reimbursement of EPA's oversight costs as permitted by the 1997 Consent Decree.

G. Settling Defendant has agreed to reimburse the United States \$628,164.79 for EPA's outstanding past response costs, including oversight costs from April 17, 1997 through May 12, 2006. Settling Defendant has also agreed to reimburse the United States through annual billing of all future response costs incurred and to be incurred, including oversight costs. The United

States acknowledges that Settling Defendant made a payment on August 6, 2007 which included reimbursement for costs incurred between May 12, 2006 and April 30, 2007. The United States will continue billing from August 6, 2007 for outstanding future response costs, including oversight costs.

H. Section XXXII. "MODIFICATION" of the 1997 Consent Decree provides that material modifications can be made to provisions of the Consent Decree with written approval by the United States, the Department and Settling Defendant.

I. The Parties agree, and this Court by entering this Modification Agreement finds, that this Modification Agreement has been negotiated by the Parties in good faith, that settlement of this matter will avoid prolonged and complicated litigation between the Parties, and that this Modification Agreement is fair, reasonable, and in the public interest.

NOW THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. Except as specifically modified herein, all provisions of the 1997 Consent Decree shall remain in full force and effect.

## **II. MODIFICATIONS TO PART IV. DEFINITIONS**

2. The Definition of "Future Response Costs," in Part IV. Para. 4. f. is amended and replaced by the following:

f. "Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs in reviewing or developing plans, reports and other items, verifying implementation of the Work, or otherwise implementing, overseeing, or enforcing the response action at the site as follows: (1) for Future Oversight Costs, costs incurred

after May 12, 2006; and (2) for all other Future Response Costs, costs incurred after April 30, 2007.

3. The Definition of "Oversight Costs," in Part IV. Para. 4. m. is amended and replaced by the following.

m. "Future Oversight Costs," shall mean that portion of Future Response Costs that EPA incurs in monitoring and supervising Settling Defendant's performance of the Work to determine whether such performance is consistent with the requirements of this Consent Decree, including costs incurred in reviewing plans, reports and other documents submitted pursuant to this Consent Decree, as well as costs incurred in overseeing implementation of the Work; however, Oversight Costs do not include, *inter alia*: the costs incurred by the United States pursuant to Sections VII (Remedy Review), X (Access and Institutional Controls), XVI (Emergency Response), and Paragraph 88 of Section XXII (Work Takeover), or the costs incurred by the United States in enforcing the terms of this Consent Decree, including all costs incurred in connection with Dispute Resolution pursuant to Section XX (Dispute Resolution) and all litigation costs.

4. The Definition of "Past Response Costs," in Part IV. Para. 4. p. is amended and replaced by the following.

p. "Past Response Costs" shall mean all costs, including but not limited to direct and indirect costs, that EPA, DEP and/or DOJ on behalf of EPA or DEP, has paid in connection with the Site plus Interest on such costs which has accrued pursuant to 42 U.S.C. § 9607(a) as follows: (1) Past Response Costs shall include all costs, formerly identified as "oversight costs," including but not limited to direct and indirect costs, that EPA, DEP and/or DOJ on behalf of EPA

or DEP has paid in connection with the Site, plus accrued Interest on all such costs, from April 16, 1997 through May 12, 2006; and (2) Past Response Costs shall include all other costs, including but not limited to direct and indirect costs, and Interim Response Costs, that EPA, DEP and/or DOJ on behalf of EPA or DEP has paid in connection with the Site, plus accrued Interest on all such costs through April 30, 2007.

5. The definition of "Matters Addressed in this Consent Decree" in Part IV, Para. j. is amended and replaced by the following:

j. "Matters Addressed in this Consent Decree" means all claims of the United States and the Department for recovery of "Past Response Costs," "Future Response Costs" and "Future Oversight Costs," as those terms are defined in this Consent Decree, and all claims of the United States and Department for the costs of, or performance of, the "Work" as the term is defined in the Consent Decree.

### **III. MODIFICATIONS TO PART V. GENERAL PROVISIONS**

6. Paragraph 6, a. "Commitment by Settling Defendant " shall be amended and replaced by the following:

6. Commitments by Settling Defendant

a. Settling Defendant shall finance and perform the Work in accordance with this Consent Decree, the ROD, the Performance Standards, and all Work Plans and other plans, standards, specifications, and schedules set forth herein or developed pursuant to this Consent Decree. Settling Defendant shall also reimburse the United States and the Department for Past Response Costs, Future Response Costs and Future Oversight Costs.

#### **IV. MODIFICATIONS TO PART XVII. REIMBURSEMENT OF RESPONSE COSTS**

7. Paragraphs 58-61 shall be amended and replaced with the following:

58. Payment of Past Response Costs to the EPA Hazardous Substance Superfund.

a. Within thirty (30) days of entry of the 2007 Modification of this Consent Decree, Settling Defendant shall pay to the EPA Hazardous Substance Superfund \$628,164.79.00 in reimbursement of Past Response Costs.

b. Payment shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT procedures, referencing the EPA Region and Site Spill ID Number 0323, and DOJ Case Number 90-11-3-1436, and the U.S. Attorney's Office File Number 1997V00172. Payment shall be made in accordance with instructions provided to Settling Defendant by the Financial Litigation Unit of the U.S. Attorney's Office in the Middle District of Pennsylvania following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. Eastern Time shall be credited on the next business day. Settling Defendant shall send notice to EPA and DOJ that payment has been made in accordance with Section XXVII (Notices and Submissions) and to:

Barbara Borden (3PM30)  
U.S. Environmental Protection Agency  
Region III  
1650 Arch Street  
Philadelphia, PA 19103

Of the total amount to be paid pursuant to this Paragraph, \$200,000.00 shall be deposited in the Centre County Kepone Site Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions, including oversight, at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund. The remaining \$428,164.79 to be paid pursuant this Paragraph shall be deposited in the EPA Hazardous Substance Superfund.

59. Payment of Future Response Costs to the EPA Hazardous Substance Superfund.

a. Settling Defendant shall pay to EPA all Future Response Costs not inconsistent with the National Contingency Plan. On a periodic basis the United States will send Settling Defendant a bill requiring payment that includes a cost summary, setting forth direct and indirect costs incurred by EPA, DOJ and their contractors. Settling Defendant shall have the right to request the underlying cost documentation associated with that bill within fourteen (14) days of its receipt of bill. Such cost documentation shall include, but not necessarily be limited to, the following types of documents: time sheets; travel vouchers; contractor invoices; and contractor work performance documents, subject to the confidential business information provisions of 40 C.F.R. §§2.201-2.215. Settling Defendant shall make all payments within 30 days of Settling Defendant's receipt of such underlying cost documentation for that bill requiring payment, except as otherwise provided in Paragraph 60. In the event that Settling Defendant does not request additional documentation, payment shall be made within thirty (30) days of receipt of the bill. Settling Defendant shall make all payments required by this Paragraph by a certified or cashier's



check or checks made payable to "EPA Hazardous Substance Superfund," referencing USAO File Number 1997V00172, EPA Region and Site Spill ID Number 0323, and DOJ Case Number 90-11-3-1436. Settling Defendants shall send the check(s) to:

United States Environmental Protection Agency  
Region III  
Attention: Superfund Accounting, P.O. Box 360515  
Pittsburgh, PA 15251-6515

b. At the time of payment, Settling Defendant shall send notice that payment has been made to EPA and DOJ in accordance with Section XII (Notices and Submissions), and to the EPA officials set forth above in Paragraph 58 (Payment of Past Response Costs). Such notice shall reference the EPA Region and Site/Spill Identification Number 0323, DOJ case number 90-11-3-1436, and the civil action number.

60. Contested Payment Procedures. Settling Defendant may contest payment of any Future Response Costs under Paragraph 59 if it determines that the United States has made an accounting error or if it alleges that a cost item that is included represents costs that are inconsistent with the NCP. Such objection shall be made in writing within 30 days of receipt of the bill or within (30) days of receipt of cost documentation, if such documentation has been requested in accordance with paragraph 59 and must be sent to the United States pursuant to Section XXVII (Notices and Submissions). Any such objection shall specifically identify the contested Future Response Costs and the basis for objection. In the event of an objection, the Settling Defendant shall within the 30 day period pay all uncontested Future Response Costs to the United States in the manner described in Paragraph 58. Simultaneously, the Settling Defendant shall establish an interest-bearing escrow account in a federally-insured bank duly

chartered in the State of Pennsylvania and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. The Settling Defendant shall send to the United States, as provided in Section XXVII (Notices and Submissions), a copy of the transmittal letter and check paying the uncontested Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, the Settling Defendant shall initiate the Dispute Resolution procedures in Section XX (Dispute Resolution). If the United States prevails in the dispute, within 5 days of the resolution of the dispute, the Settling Defendant shall pay the sums due (with accrued interest) to the United States in the manner described in Paragraph 58. If the Settling Defendant prevails concerning any aspect of the contested costs, the Settling Defendant shall pay that portion of the costs (plus associated accrued interest) for which it did not prevail to the United States in the manner described in Paragraph 58; Settling Defendant shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XX (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding the Settling Defendant's obligation to reimburse the United States for its Future Response Costs.

61. Interest on Late Payments. In the event that the payments required by Subparagraph 58.a are not made within 30 days of the Effective Date or the payments required by Paragraph 58 are not made within 30 days of the Settling Defendant's receipt of the bill, or within 30 days from receipt of the cost documentation, if such documentation has been requested in

accordance with Paragraph 59, Settling Defendant shall pay Interest on the unpaid balance. The Interest to be paid on Past Response Costs under this Paragraph shall begin to accrue thirty (30) days after the Effective Date of the Consent Decree. The Interest on Future Response Costs shall begin to accrue on the date of the bill. The Interest shall accrue through the date of the Settling Defendant's payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to Plaintiffs by virtue of Settling Defendant's failure to make timely payments under this Section including, but not limited to, payment of stipulated penalties pursuant to Paragraph XXI. The Settling Defendant shall make all payments required by this Paragraph in the manner described in Paragraph 58.

**V. MODIFICATIONS TO PART XXII. COVENANT NOT TO SUE BY PLAINTIFFS**

8. Paragraphs 86-87 shall be amended and replaced with the following:

86. Covenant Not to Sue by United States. In consideration of the actions that will be performed and the payments that will be made by the Settling Defendant under the terms of the Consent Decree, and except as specifically provided in Paragraph 87 (Reservation of Rights by United States), the United States covenants not to sue or to take administrative action against Settling Defendant pursuant to Sections 106 and 107(a) of CERCLA for performance of the Work and for recovery of Past Response Costs and Future Response Costs. These covenants not to sue shall take effect upon the receipt by EPA of the payments required by Paragraph 58 of Section XVII (Payments for Response Costs). These covenants not to sue are conditioned upon the satisfactory performance by Settling Defendant of their obligations under this Consent Decree.

These covenants not to sue extend only to the Settling Defendant and do not extend to any other person.

87. Reservation of Rights by United States. The covenants not to sue set forth in Paragraph 86 do not pertain to any matters other than those expressly specified therein. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendant with respect to all other matters, including but not limited to:

- a. claims based on a failure by Settling Defendant to meet a requirement of this Consent Decree;
- b. liability arising from the past, present, or future disposal, release, or threat of release of Waste Material outside of the Site;
- c. liability based upon the Settling Defendants' ownership or operation of the Site, or upon the Settling Defendant's transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal of Waste Material at or in connection with the Site, other than as provided in the ROD, the Work, or otherwise ordered by EPA, after signature of this Consent Decree by the Settling Defendant;
- d. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- e. criminal liability;
- f. liability for violations of federal or state law which occur during or after implementation of the Remedial Action; and

g. liability, prior to Certification of Completion of the Remedial Action, for additional response actions that EPA determines are necessary to achieve Performance Standards, but that cannot be required pursuant to Paragraph 17 (Modification of the Work);

h. liability for response costs incurred or to be incurred by the United States that are not within the definitions of Past Response Costs or Future Response Costs;

i. liability for Future Response Costs not yet reimbursed pursuant to Section XVII.

j. liability for additional operable units at the Site or the final response action;

9. Paragraph 90(g) shall be amended by replacing the term "Oversight Costs" with the term "Future Oversight Costs."

10. All provisions of the 1997 Consent Decree unaffected by the foregoing modifications shall operate in conjunction with these new provisions in the same manner and to the same extent as it operated with the former provisions of the 1997 Consent Decree; and

11. Except as specifically provided for in this Order, all other terms and conditions of the Consent Decree will remain in full effect.

12. This Modification Agreement shall be lodged with the Court for period of not less than thirty (30) days for public notice and comment in accordance with Department of Justice policy as described at 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold consent if comments by the public regarding the Modification Agreement disclose facts or considerations which indicate that the modifications to the 1997 Consent Decree are

inappropriate, improper or inadequate. This paragraph does not create any rights exercisable by the Settling Defendant.

13. The Court shall retain jurisdiction of this case until termination of the 1997 Consent Decree for the purpose of enabling any of the Parties to apply to the Court for such further order, direction, or relief as may be necessary or appropriate for the construction or modification of the 1997 Consent Decree, or to effectuate or enforce compliance with its terms as modified by this Modification Agreement, or to resolve disputes in accordance with Section XX (Dispute Resolution) of the 1997 Consent Decree.

DONE and ORDERED this \_\_\_\_ Day of \_\_\_\_\_, 2008.

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JUDGE MALCOLM MUIR  
United States District Judge  
For the Middle District of Pennsylvania

**FOR THE UNITED STATES OF AMERICA:**

Date: \_\_\_\_\_

11/06/07

\_\_\_\_\_  
W. BENJAMIN FISHEROW  
Deputy Section Chief  
Environment and Natural Resources Division  
United States Department of Justice

Date: \_\_\_\_\_

11/10/07

\_\_\_\_\_  
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**FOR THE UNITED STATES OF AMERICA:**

\_\_\_\_\_  
THOMAS A. MARINO  
United States Attorney  
Middle District of Pennsylvania

Date: \_\_\_\_\_

3-4-08

\_\_\_\_\_  
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**FOR THE ENVIRONMENTAL PROTECTION AGENCY:**

**FEB 21 2008**

Date: \_\_\_\_\_

DONALD S. WELSH  
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U.S. Environmental Protection Agency, Region 3  
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Date: 2/13/08

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Date: 2/7/08

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**FOR THE COMMONWEALTH OF PENNSYLVANIA, THROUGH THE DEPARTMENT  
OF ENVIRONMENTAL PROTECTION:**

Date: 10/31/07

/ MICHAEL C. WELCH  
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Department of Environmental Protection  
Northcentral Region  
208 West Third Street, Suite 101  
Williamsport, PA 17701

Date: 10/31/07

~~17~~ NELS J. TABER  
Regional Counsel  
Northcentral Region Office of Chief Counsel  
Department of Environmental Protection  
208 West Third Street, Suite 101  
Williamsport, PA 17701

**FOR RUETGERS ORGANIC CORPORATION:**

Date: 10/31/07

Raifer Domalski  
President & CEO  
201 Struble Road  
State College, PA 16801

Agent Authorized to Accept Service on Behalf of Above-signed Party:

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